



ACC'S CLO THINKTANK SERIES 2006

**The CLO's Role in Corporate Governance & Compliance-
Canada**

Hosted by David Allgood, CLO of Royal Bank of Canada

September 29, 2006

10:00 a.m. – 2:00 p.m.

Le Royal Meridien King Edward Hotel- Toronto, Canada

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Participants' Briefing Materials

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SUMMARY/OUTLINE: THE CLO'S ROLE IN CORPORATE GOVERNANCE & COMPLIANCE

The following outline is intended to highlight some of the issues at the heart of this discussion topic. There may be other issues we've not identified or perspectives on the identified issues that are not represented in the outline: you should feel free to raise these additional thoughts, as you like. *The outline is merely intended as a starting point to help you identify discussion topics and is submitted for collaborative consideration by the participants.*

I. Fundamental Considerations for the Chief Legal Officer- CLO's Role in Governance & Compliance Generally *(See Tab 1)*

A. Should the CLO be the Chief Compliance Officer (CCO)? Principal business model options:

1. **CLO as CCO:** CLO formally has title or role of CCO and has direct oversight of general compliance duties throughout the company
2. **CCO Reports Organizationally to CLO or law department:** Law department coordinates with or supports a chief compliance officer (or other internal controls function personnel) which officer is charged with direct responsibility for general compliance throughout the company
3. **CCO and Compliance Function as a separate business function without organizational reporting relationship to the law department:** Law department advises the company's CCO and compliance function and/or respective business units that otherwise have direct and independent compliance function responsibilities but compliance leaders (such as a CCO) report directly to the CEO or a board committee, but not to the CLO
4. **Other models...**

B. Pros, Cons and Other Issues Implicated by the Several Compliance Models

1. If the CLO is the CCO, what are the CLO's personal fiduciary responsibilities in that capacity? Is the CLO-CCO the "client" with another lawyer advising in this functional role? If so, what are the professional responsibility implications? If not, what are the implications of losing the attorney-client privilege? What steps does the CLO-CCO take to communicate which 'hat' is being worn during sensitive compliance discussions?
2. What are the likely market or "industry" implications of which model is adopted? If each model can be effective, is one better or worse than the others in terms of public and market perceptions?

3. What are the principal implications of the respective models for cross-border operations?

II. The role of the CLO with respect to Continuous Disclosure (See Tab 2)

- A. The new regime of Part XXIII.1 of the *Ontario Securities Act*
- B. Protections Against Liability
 1. Due diligence defense best practices
 - (i) **Disclosure committee** - As CLO, are you a member of the Disclosure Committee or do you perform an advisory role to the committee with a member of your staff having an official role as member of the committee? How often does the committee meet? What is the charter or scope of the committee's functions?
 - (ii) **Internal certifications and sub-certifications**- Do you provide written internal certifications? Do other lawyers within your law department provide certifications or sub-certifications? What is the certification process? What is the scope of/ types of limits on the certification you and/or your lawyers provide?
 - (iii) **Press release and conference call protocols**- What processes does your law department implement and what role(s) do lawyers perform as part of the public disclosure process? How has your role as CLO changed in recent years with respect to this process?
 - (iv) **Communications policies**- Has your law department helped to develop policies regarding disclosure communications? What role do lawyers and you as CLO play as part of the overall communications strategy?
 - (v) **Tools, databases, software**- Does your organization/law department use technology or tools as part of internal controls and the disclosure process? Have you identified tools or processes that you view to be best or leading edge practices?
 2. Forward-looking statement cautionary language challenges
 - (i) **Keeping the material up-to-date**- What processes have you implemented to help address this challenge? What types of practices is your law department implementing to help ensure that in-house lawyers have the requisite financial expertise to spot issues?
 - (ii) **Describing all material factors and assumptions**- What processes does your organization use to help ensure material factors and assumptions are described? What role do you as CLO or your in-house lawyers play in this process?

3. Opinions of experts-Guideline (AuG-44 of the CICA): auditors written consent and the practical problems related thereto (*See Tab 3*)

III. Special Shareholder-Focused Matters (*See Tab 4*)

- A. Inclusion (or not) of shareholder proposals in proxy materials
- B. The movement for majority voting in director elections
- C. Implications of the potentially divergent interests reflected in the institutional versus “public” shareholder dichotomy

IV. Special Management-Focused Issues (*See Tabs 5-7*)

- A. Implications of Increasing Scrutiny on Executive Compensation (*See Tab 5*)
 1. Movement for enhanced disclosures requirements
 2. Potential for “substantive” limitations or parameters – e.g., pay for performance, etc.
 3. For global companies, potential implications of regulatory standards or other protocols in international jurisdictions
- B. Functional Utilization of Compliance Programs in Key Legal and Operational Areas
 1. Competition and antitrust (*See Tab 6*)
 2. Environmental
 3. Fair labor standards
 4. Diversity, equal opportunity and antidiscrimination
 5. Potential special international component for overseas operations
 6. Other
- C. Role of CLO with Respect to Insider Reporting (*See Tab 7*)
 1. National Instrument 55-101
 2. Who is on point for filing insider reports for Directors or management? What role does the law department play (if any)?

V. Role of the CLO with respect to Board Composition, Assessment, Education and Processes (*See Tab 8*)

- A. Role of the CLO in helping the Board assess the independence of directors
- B. Role of the CLO with respect to Director Nomination/Recruitment Processes
- C. Board and Individual Director Assessments
 1. Internal processes
 2. Outside programs

3. Should the results of the assessments be kept in file (potential liability following a seizure)
 - D. Ongoing Director Education Programs
 1. Internal processes, including role of CLO and outside counsel
 2. Outside programs
 3. Potential for collaborative programs among several companies
 - E. Meetings of Independent Directors Only
 - F. Relationships of the CLO with Prescribed Standing Committees of Independent Directors – e.g., Audit Committee, Compensation Committee and Nominating Committee
 - G. Recordkeeping of Board and Board Committee Deliberations
 1. Proper content and level of detail in minutes
 2. Disposition of preliminary drafts of minutes
 3. Note-taking by individual directors at meetings – disposition and other issues
 - H. Functionality of “Board Books” and Other Information Delivery Systems for Directors
 1. How much is enough? Too much? CLO’s role in deciding?
 2. Security and confidentiality protocols
 3. Disposition of drafts items that are not delivered
 4. Post-meeting disposition of board books
- VI. The relationship between the CLO and the internal and external auditors (See Tab 3)**
- A. Internal Auditors
 1. **Organizational considerations-** Does the internal audit group have an organizational reporting relationship to the law department? To whom does the head of internal audit report (to the CFO, CEO, CLO, Board, combination, other...)? How does your law department provide staffing or support to the internal audit group?
 2. **Requests of internal auditors to the legal department-** What is the process for receiving and responding to requests? Are there designated in-house lawyers on point for receiving requests and providing support?
 3. **The impact of privilege considerations on internal audit-** Is privilege a consideration in establishing policies for staffing and conducting internal audits? If so, for all internal audits or for those that meet certain criteria? How have privilege considerations impacted the process for conducting internal audits (staffing, development of written reports, dual reports—one

for public disclosure and one with internal legal impressions, etc.)? What steps does your organization take to create and maintain privilege protections for audits? Has your organization experienced an increase in requests for privileged audit-related documents? What strategies have you implemented in response to these requests?

B. External Auditors

1. **Changes to the engagement letters in recent years-** What types of changes have you seen, and are there certain types of provisions that you view as most controversial and problematic? What types of successful strategies have you implemented to address these changes?
2. **New requirements on auditor independence-** How have these requirements impacted practices and services provided by external auditors?
3. **Role of external auditors-** Has the role of external auditors expanded in recent years? Do external auditors regularly attend Board and Audit Committee meetings? Are they present for executive sessions? Do you or members of your law department participate in periodic face-to-face meetings with external auditors?
4. **Information provided to external auditors and “bring-down” certificates-** What mechanisms does your law department use to provide information to external auditors: periodic face-to-face meetings, written bring-down reports, etc.? Do external auditors request different information or certifications from in-house and outside counsel?
5. **Guideline AuG-44 and the related implementation problems**
6. **Timing issues regarding the posting and issuance of shareholder material-** How do you deal with the challenge of ensuring timely posting and accuracy of shareholder materials?
7. **Access of external auditors to privileged documents-** Is protecting privilege an issue in providing information to external auditors? What types of strategies have you implemented to successfully provide the information requested by auditors?
8. **Threats by external auditors to withhold audit letter or to send a cautionary letter to the audit committee chair in case of disagreement with management-** Has your law department encountered these types of situations? What has your role as CLO been in helping to resolve them? What types of strategies has your law department implemented to address these situations?

VII. Role of the CLO with respect to Policies and Channels for Reporting Concerns (Whistleblowing) (See Tab 9)

A. Policies

1. Policies in place regarding the reporting of financial concerns or allegations of financial fraud
2. Separate policy for these matters vs broad policy for reporting concerns generally
3. Obligation/requirement vs expectation/encouragement to report such concerns
4. Communication of policies to employees (through governance policies, code of ethics, etc.)
5. Separate codes of conducts for directors, executives and employees vs unified approach

B. Channels for reporting concerns

1. Channels for reporting concerns generally- Does an external service provider receive initial reports and transmit them to contacts within the organization or do reports come directly to an individual or group within the organization (or a combination)?
2. Channels available for reporting financial concerns
3. Direct line to the audit committee
4. Direct line to the CLO
5. Opportunities to submit a confidential or anonymous report?
6. Different mechanisms in place for different parts of the company or different countries where the company operates

C. Process for investigating concerns

1. Internal process for receiving concerns and investigating reports alleging financial misconduct or fraud
2. Processes in place for investigating other misconducts
3. Respective roles of the internal audit, audit committee, law department and human resources department
4. Early report of such matters to CLO?
5. Who should take the lead (audit committee, internal audit, law department, etc.) in investigating a reported concern?

D. Role of Law Department/CLO

1. Is law department on point for initially receiving reports of concerns?
2. At what point in the process are reported concerns shared with the law department?

3. Does your organization have guidelines on what channels to use and who should be notified of certain types of concerns?
 4. As CLO, how much information (and in what form) do you generally receive on reported concerns?
- E. Privileges
1. Considerations in determining the process for conducting internal investigations
 2. Ensuring confidentiality while at the same time obtaining sufficient information and avoiding frivolous complaints